EDITOR'S NOTE

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A-698

IN THE

SUPREME COURT OF THE UNITED STATES

SYVASKY LAFAYETTE POYNER, et al.,

Petitioners

v.

EDWARD W. MURRAY,
Director, Virginia Department of Corrections, et al.,

Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
For the Fourth Circuit and
Motion for Stay of Execution

RESPONDENTS' APPENDIX

To Brief in Opposition to Petition
for Writ of Certiorari and Opposition
to Motion for Stay of Execution

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[redacted]
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

SYVASKY LAFAYETTE POYNER #128051,

Petitioner,

v. CIVIL ACTION NO. 89-204-N

EDWARD W. MURRAY, Director of the Virginia Department of Corrections,

Respondent.

MAGISTRATE'S REPORT AND RECOMMENDATION

This matter was initiated by petition for a writ of habeas corpus under 28 U.S.C. § 2254. Petitioner is a prisoner in the Virginia penal system awaiting execution of a death sentence. The matter was referred to the undersigned United States Magistrate pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and (C) and Rule 29 of the Rules of the United States District Court for the Eastern District of Virginia.

A. STATEMENT OF THE CASE

1. Background

Petitioner was convicted on June 6, 1984, in the Circuit Court of the City of Williamsburg and County of James City for the capital murder of Clara Louise Paulette and the capital murder of Chestine Brooks. On June 7, 1984, the jury sentenced petitioner to death for each capital murder conviction. On July 18, 1984, the trial court affixed petitioner's sentences of death. Petitioner is currently incarcerated in the Virginia penal system awaiting execution of these death sentences as well as three other death sentences.

The present petition is one of three petitions [illegible] Court will review. All of the petitions [illegible] convictions in three separate trials. Petitioner's trial in Williamsburg was the first of the three trials. The second trial

(4th Cir. 1978); cert. denied, 441 U.S. 911 (1979)." The Court will not judge counsel's effort from hindsight, but rather from the perspective of counsel at the time in question. Id. From the Court's review of the record, it appears that counsel acted competently and adequately. The Court finds no violation of Washington with respect to Grounds 8, 9, 10, 11, 12, 13, 14, 16, 17, 19, 23, 25, 26, 27, 28, 30, and 33.

Therefore, these grounds are found to be without merit.

Ground 18

In Ground 18 petitioner alleges that counsel failed to argue that extenuating circumstances existed with respect to the videotaped confession, which demonstrated petitioner's unremorseful, matter-of-fact responses. Petitioner offers as examples of the extenuating circumstances "[s]uch facts as the paternal influence of Detective Spinner, the length of time between arrest and videotaping, the mental capacity of Petitioner, the staged, rehearsed format, and so forth." Petitioner concludes that these circumstances explain petitioner's lack of remorse and matter-of-fact responses.

The Court rejects petitioner's arguments. The Court finds that petitioner has not borne the burden of proving with particularity how counsel's performance was inadequate. Strickland v. Washington, 466 U.S. 668 (1984). Petitioner sets forth conclusory statements, failing to plead the actual prejudice that allegedly resulted from counsel's deficiency.

The Court has viewed petitioner's videotaped confession. The Court finds that petitioner was lucid and articulate at the time of the videotaping. Petitioner spoke of the heinous murders he had recently committed in a methodical fashion and without any expression of remorse whatsoever. The Court finds that the videotape portrayed petitioner accurately as a cold-blooded murderer. Consequently, the Court determines that no extenuating circumstances existed. Thus, counsel had no basis to argue extenuating circumstances and even if they had, it was within their province to select what tactics they would use at trial.

A 498 2

FILED
IN OPEN COURT
CLERK, U.S. DISTRICT COURT
RICHMOND, VA

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

SYVASKY L. POYNER, on behalf of himself and all others similarly situated,	)	
Plaintiffs,	)	CIVIL ACTION NO. 91-CV-815
v.	)	
EDWARD W. MURRAY, Director, Virginia Department of Correction, ELLIS B. WRIGHT, JR., Warden, Greensville Correctional Center, and JOHN DOE, Executioner,	)	
Defendants.	)	

ORDER

WHEREAS plaintiff Syvasky L. Poyner, on behalf of himself and all others similarly situated, by counsel, filed a Complaint against Edward W. Murray, Director of Virginia Department of Corrections, Ellis B. Wright, Jr., Warden, Greensville Correctional Center, and John Doe, Executioner, seeking permanent injunctive and declaratory relief pursuant to 42 U.S.C. § 1983 with respect to the allegedly unconstitutional procedure and means utilized by the defendants and prescribed by the law of the Commonwealth for executing prisoners in Virginia;

AND WHEREAS plaintiff has served on defendants a request to permit entry upon land for purposes of inspecting and videotaping (with audio) the execution of Timothy Bunch, scheduled for Thursday, December 10, 1992 at 11:00 p.m. at the Greensville Correctional Center;

AND WHEREAS plaintiff also has requested that the condemned prisoner's face be visible during the execution;

3

AND WHEREAS plaintiff also has requested that plaintiff's [illegible] be allowed to participate in any autopsy of Timothy Bunch;

AND WHEREAS plaintiff has filed a motion to shorten time for defendants to respond to plaintiff's request to permit entry upon land for inspection and videotaping and requiring defendants to provide plaintiff's representatives access to the Execution Chamber at the Greensville Correctional Center for the purpose of inspecting and videotaping the execution of Timothy Bunch;

HAVING CONSIDERED the arguments contained in plaintiff's motion and memorandum in support thereof, and the oral arguments of counsel for the plaintiff and counsel for the defendants before this Court;

IT IS ADJUDGED AND ORDERED that defendants are manditorily enjoined to permit Gilbert F. Halasz, this Court's reporter, for the purpose of supervising Charles Bradshaw, both of whom shall be permitted entry into the Execution Chamber of the Greensville Correctional Center at 9:00 p.m. on Thursday, December 10, 1992, for the purpose of inspecting and videotaping (with audio) the execution of Timothy Bunch;

AND IT IS FURTHER ADJUDGED AND ORDERED that the execution be performed with the condemned prisoner's face visible during the execution providing same is agreeable to the condemned prisoner, who shall be asked to state his acquiescence or refusal in the presence of the aforementioned Gilbert F. Halasz.

IT IS FURTHER ADJUDGED AND ORDERED that the said Charles Bradshaw, for the purpose of videotaping the execution, be placed

in a position whereby the camera will be able to observe the [illegible] person other than the condemned prisoner. ~~Insofar as possible such taping shall be limited to condemned prisoner's face~~.

Following said execution, the videotape shall be placed in the possession of Gilbert F. Halasz, who shall deliver the same to the Court prior to any viewing of said tape.

IT IS FURTHER ADJUDGED AND ORDERED that plaintiff may have one representative present to observe any autopsy that may be performed on the said Timothy Bunch.

UNITED STATES DISTRICT JUDGE

Date 12-10-92
7:10 p.m.

A TRUE COPY TESTE:
DORIS R. CASEY, CLERK OF COURT
BY: Robert L. Walker, Deputy Clerk

Filed: December 10, 1992

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 92-7229

IN RE ELLIS B. WRIGHT,

Petitioner.

ORDER

In the case of Poyner v. Murray, Civil Action Number 92-CV-815, in the United States District Court for the Eastern District of Virginia at Richmond, the district judge issued an injunction requiring the Petitioner to permit the photographing by videotape of the execution of Timothy Dale Bunch with Bunch's mask removed, and thereafter to participate in the autopsy of the body of said Bunch following Bunch's execution, as well as to take other similar actions.

The Petitioner has sought here a Writ of Prohibition under 28 U.S.C. § 1651 questioning the jurisdiction of the said district judge to have issued said order.

We note that the said order of the district court was issued at the eleventh hour, that is to say at about 7:15 p.m. before a scheduled execution time of 11:00 p.m., although the execution [illegible]

of Bunch had been set by the Circuit Court of Prince William County [illegible] including Poyner and his attorneys.

In addition to the aforementioned unseemly and undue haste in this matter of grave public importance, the petition for a Writ of Prohibition places grave doubt on whether the district court had any jurisdiction to act in the premises.

Because of the requirements of time, argument on the Petition for Writ of Prohibition could not be had; neither was there time to require memoranda. The papers before us, however, reveal on their face an attempt by Poyner to interfere in the execution of Bunch, and the jurisdiction of the district court to interfere in Bunch's execution at the instance of Poyner is very doubtful if it exists at all.

It is accordingly ADJUDGED AND ORDERED that the order of the district court referred to above in the case of Poyner v. Murray, Civil No. 92-CV-815, shall be, and it hereby is, stayed and held for naught until further order of one of the judges signing this order or of this court.

Because section 1651(b) indicates definitely that either Judge Widener or Judge Wilkinson or Judge Sprouse may enter this order as an individual judge they have signed the same as individual judges.

So far as they may be considered as acting for the court, they have signed this order as a panel thereof.

/s/ H. E. Widener, Jr.
H. E. Widener, Jr.
United States Circuit Judge

/s/ James M. Sprouse
United States Circuit Judge

/s/ J. Harvie Wilkinson, III
J. Harvie Wilkinson, III
United States Circuit Judge

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF WILLIAMSBURG
AND COUNTY OF JAMES CITY

COMMONWEALTH OF VIRGINIA

v. CRIMINAL NOS. 4868-A, 4869-A

SYVASKY LAFAYETTE POYNER

ORDER

On the 21st day of January, 1993, pursuant to Section 53.1-232 of the Code of Virginia, came the Commonwealth, by its Attorney, and the Defendant in person and with counsel, to be heard upon the Commonwealth's Motion to set an execution date.

There is presently no stay of execution in effect. Having determined that an execution date should be set, this Court hereby ORDERS that the execution of Syvasky Lafayette Poyner's death sentences be carried out on the 18th day of March, 1993, at such a time of day as the Director of the Department of Corrections shall fix.

It is further ORDERED that at least ten (10) days before March 18, 1993, the Director shall cause a copy of this Order to be delivered to the defendant and, if the defendant is unable to read it, cause it to be explained to him. The Director shall make return thereof to the Clerk of this Court.

The Clerk is directed to promptly furnish certified copies of this Order to the following persons:

Edward W. Murray, Director
Virginia Department of Corrections
P.O. Box 26963
5900 Atmore Drive
Richmond, Virginia 23261

George C. Fairbanks, IV, Commonwealth's Attorney
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Entered this 21st day of January, 1993.

John M. Folkes
Judge

I ask for this:

George C. Fairbanks, IV
Commonwealth's Attorney

Seen and objected to:

Alexander H. Slaughter
Counsel for Syvasky Lafayette Poyner

A COPY TESTE:
HELENE S. WARD, CLERK
BY _____
Deputy Clerk

IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

RECORD NO. _____

SYVASKY LAFAYETTE POYNER,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

PETITION FOR APPEAL

EXECUTION SCHEDULED FOR MARCH 18, 1993

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I. PRELIMINARY STATEMENT

[illegible] Petition For Appeal from the order entered January 21, 1993, by the Circuit Court of the City of Williamsburg and James City County setting the date of Poyner's execution by electrocution. See Exhibit 1 (attached). The court erred by denying Poyner's motion for an evidentiary hearing to determine whether the recently redesigned and relocated electric chair in the Greensville Correctional Facility inflicts cruel and unusual punishment upon prisoners.

When Poyner was originally convicted in 1984, the Commonwealth executed prisoners in an electric chair in the State Penitentiary in Richmond. In 1990, however, the Commonwealth scrapped the old prison and the old electric chair, and located a new death chamber and redesigned electric chair in Greensville County, Virginia. Moreover, the Commonwealth changed its method of electrocuting prisoners in late 1991 after a botched execution in which the prisoner did not die as quickly as the Department of Corrections apparently expected. The Commonwealth decided for future executions to subject prisoners automatically to a second massive jolt of electricity. See Exhibits 2 and 3 (attached).

Based on substantial evidence gathered by his counsel concerning the gruesome cruelty of the new device and procedures, Poyner sought to challenge this new method of punishment below. Neither the Greensville electric chair nor the new procedure requiring the prisoner to undergo two jolts of electricity existed in 1984, so this is Poyner's first opportunity to assert

his constitutional claim in a Virginia state court. The lower court erroneously denied Poyner his "day in court" on this important issue.

This appeal implicates an issue of immense public importance: Is the Commonwealth of Virginia now executing prisoners in a cruel and unusual manner in violation of the Eighth and Fourteenth Amendments of the United States Constitution and in violation of Article I, Section 9 of the Virginia Constitution? A tribunal in the Commonwealth must eventually conduct an evidentiary hearing on the matter.

Although numerous cases, both federal and state, have stated the general proposition that death by electrocution is not cruel and unusual, no court in Virginia has ever reviewed any evidence about the physical effects of electrocution *as carried out in Virginia*. No litigant has ever presented a Virginia court with a proper record and evidence, as Poyner is prepared to do, on which a court can base a reasoned decision on the issue. Indeed, no court since 1890 has considered evidence about electricity's effect on the human body, despite significant advances in medical and scientific understanding of these phenomena. An evidentiary hearing on the nature of electrocution in Virginia that includes testimony of preeminent experts in the relevant fields of science and medicine is necessary to decide the issue.

This appeal should be granted to resolve an imminent split among the circuit courts of Virginia. The lower court's ruling in this case conflicts with the recent ruling of another circuit

court. The Circuit Court for Loudoun County agreed that a Virginia court must hear evidence on this very issue.[1] The Circuit Court for Loudoun County recognized that no court has reviewed the medical and scientific evidence concerning electrocution in over 100 years, and that no court has ever taken evidence on Virginia's method of electrocution. In setting aside five days to receive evidence, that court stated:

> And certainly science and technology has advanced an awful lot since 1890. And I feel somewhere a court has got to hear the evidence of what the state of the art is now on the effect of electricity on the human body during the course of execution by electrocution in Virginia.

Transcript, Commonwealth v. White, Circuit Court for Loudoun County, Crim. No. 8129 (February 11, 1993), at 5 (attached as Exhibit 12). The evidentiary hearing, however, never took place because the Commonwealth dropped the capital murder charge the next day and rendered the issue moot. Of course, the ruling in Loudoun County assures that other capital murder defendants will continue to assert this claim until this Court issues a definitive ruling on the propriety of an evidentiary hearing.

Although Poyner has previously pursued the ordinary course of appeals and habeas corpus petitions, he never had the opportunity to challenge the constitutionality of the new procedures and the redesigned electric chair in a Virginia court

---

[1]Poyner's counsel had appeared as special counsel for the defendant White for the sole purpose of presenting the constitutional challenge to Virginia's particular form of electrocution.

until the Commonwealth moved to set his execution date at the hearing on January 21, 1993. Over Poyner's objection, the trial court below denied Poyner's request for an evidentiary hearing on the issue and set the execution date for March 18, 1993. Poyner now faces a form of punishment that he contends causes unconstitutionally excruciating pain and torture. If this Court does not vacate the trial court's ruling and remand the case for a hearing, Poyner will not have had, and never will have, the opportunity to present his evidence to a court in this Commonwealth.

II. ASSIGNMENT OF ERROR

The court below erred in denying Poyner's motion for an evidentiary hearing regarding the constitutionality of Virginia's new method of electrocuting prisoners.

III. QUESTION PRESENTED

Did the court below err when it denied Poyner his day in court to present evidence in support of his claim that the Commonwealth's new electric chair in Greensville and new procedures for automatically applying a second jolt of electricity inflict unnecessary pain and torture in violation of the United States and Virginia Constitutions?

This question relates to the sole assignment of error.

IV. NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

Poyner was originally convicted of five counts of capital murder in 1984 in the respective circuit courts of Williamsburg, Hampton, and Newport News. Poyner was sentenced to death for each count. As of that time, Virginia's statutes required that death sentences be carried out by electrocution at the State Penitentiary in Richmond. Va. Code § 53.1-233 (Repl. Vol. 1988), amended, Va. Code § 53.1-233 (Repl. Vol. 1991)(the amendment rescinded the requirement that executions be performed in Richmond). Poyner appealed the convictions and death sentences to this Court, which affirmed each conviction and death sentence. Poyner v. Commonwealth, 229 Va. 401, 329 S.E.2d 815, cert. denied sub nom. Poyner v. Virginia, 474 U.S. 865 (1985). Although Poyner generally challenged the constitutionality of Virginia's capital murder statute on direct appeal to this Court, see Poyner v. Commonwealth, 229 Va. at 406, 329 S.E.2d at 820, he did not challenge the method of execution as it existed at that time.

Prior to 1990 (when the Department of Corrections began using the present electric chair in Greensville), Poyner unsuccessfully filed petitions for writs of habeas corpus in state and federal courts. Of course, the Commonwealth had not yet established a "two-jolt" procedure nor redesigned and rewired the electric chair. Thus, until now, Poyner has never been able to challenge in state court the new method by which the Commonwealth now seeks to execute him.

Poyner recently attempted to raise this issue in federal court in a class action under 42 U.S.C. § 1983, but he was denied the opportunity to present his evidence there. Poyner v. Murray, No. 92-CV-815 (E.D. Va. filed Dec. 10, 1992). See Complaint attached as Exhibit 4. The Fourth Circuit thwarted Poyner's attempt to present evidence on this issue when, on appeal of a simple discovery order and without briefs or arguments, it ordered the case to be dismissed. The Fourth Circuit's order of January 19, 1993, did not even address Poyner's claim concerning Virginia's particular method of electrocution; rather, the court relied on numerous cases standing for the proposition that electrocution is not per se unconstitutional. See Exhibit 5 (attached).

Poyner also sought below to present his evidence concerning the Greensville electric chair when the Commonwealth sought a date to execute Poyner with that device. On January 21, 1993, the Circuit Court for the City of Williamsburg and James City County held a hearing for the purpose of setting a date for Poyner's execution.[2] At that hearing, counsel for Poyner moved the court to conduct an evidentiary hearing on the issue of the constitutionality of this new method of execution by electrocution. The court denied Poyner's request and entered an

[2]Prior to the hearing and before the federal courts dismissed his case, Poyner had filed a Motion For Continuance in the circuit court based on the pendency of the federal court action. See Exhibit 6 (attached). This Motion For Continuance and its exhibits set forth the factual bases for Poyner's arguments that electrocution in Virginia is cruel and unusual punishment.

order over Poyner's objection providing that Poyner's execution by electrocution would be carried out on March 18, 1993.

Poyner appeals from the entry of that order, and specifically from the trial court's denial of the motion for an evidentiary hearing regarding the constitutionality of Virginia's particular method of execution by electrocution. The courts of this Commonwealth are charged with the duty to ensure that no prisoner be subjected to cruel and unusual punishment, no matter how unpopular his crime. The courts cannot discharge this duty without taking evidence. In this appeal, Poyner does not challenge the constitutionality of the death penalty itself, nor does Poyner ask this Court today to reach the merits of his claim because proper consideration of this claim requires evidence. Poyner simply wants an opportunity to be heard on this issue. Like any Virginian, he is entitled to his day in court.

V. STATEMENT OF FACTS

Poyner is subject to five death sentences. Death sentences in the Commonwealth of Virginia are carried out by electrocution. Va. Code § 53.1-233 (Repl. Vol. 1991). The Director of Corrections is vested with discretion to carry out the "proper execution of prisoners by electrocution." Id. He must maintain a "death chamber" with "all the necessary appliances" for electrocuting prisoners. Id. Exercising this discretion, the Director ordered that the electric chair be redesigned, re-worked, and rewired when the death chamber was moved to Greensville in 1990. Moreover, the Director directed a change in

procedures after the execution of Derrick Lynn Peterson on August 22, 1991. Peterson did not die according to plan when the electricity was first applied, thereby necessitating additional jolts of electricity to kill him. Within two weeks of Peterson's troublesome execution, the Director ordered that prisoners in future executions be subjected automatically to a second dose of electricity after a waiting period. See Exhibit 2 (attached). In addition, the Engineering staff from the Department of Corrections and the electric chair's manufacturer "visited the site to readjust the voltage and timing for use in executions." Id.

In its response to discovery requests in Poyner's federal action, the Commonwealth admitted that the electric chair in Greensville constituted a new appliance for the execution of prisoners. See Exhibit 7 (attached), at 1-2. The Commonwealth objected to disclosing any information that "predates the use of the electric chair at Greensville" as irrelevant because "Virginia's current electric chair . . . is located at the Greensville Correctional Center and has been in existence only since Greensville opened in October, 1990." Id. at 2. Thus, the Commonwealth itself considers the electric chair in Greensville a new and different device. Because Poyner's appeal to this Court arose in 1984, six years before the Commonwealth began to use this new device, he obviously could not have challenged its constitutionality in 1984.

In addition to these facts, Poyner has amassed substantial evidence from experts about the effects of the Greensville electric chair on the prisoners who are executed there. See Exhibits 4, 8, 9, 10 (attached). This evidence demonstrates that the prisoner does not die instantly, but rather suffers a cruel and excruciating death as his body literally cooks. The autopsy reports of prisoners electrocuted in Greensville paint an incredibly gruesome picture of the burning and cooking inflicted on the human body.[3] Although the Commonwealth has hundreds of photographs from these autopsies, it has fought vigorously to keep those photographs secret and has never produced them. At an evidentiary hearing, the fact-finder could review these reports and photographs to observe the gory mutilation of the body during an electrocution.

In addition, experts from the fields of neuropathology, neurophysiology, forensic pathology, and electrical stimulation are prepared to testify about the physiological effects of electrocution on the person. Based on autopsy reports and other objective evidence, these experts conclude that the electric chair tortures the prisoner who suffers a slow and shockingly painful [redacted] E.g., Exhibits 4, 8, 9, 10 (attached). Moreover, [redacted] pain experts have reviewed the available [redacted] prisoners with

[3]The Circuit Court for Loudoun County ordered the Commonwealth to produce these autopsy reports in the [redacted] case, and Poyner's counsel have therefore inspected the reports. However, the court entered a strong Protective Order that prohibits dissemination of the autopsy reports. See Exhibit 11 (attached). Consequently, Poyner's counsel are not free to include them here.

materials about Virginia's method of execution and are prepared to describe the horrific and unimaginable sensations that they believe are experienced by prisoners. Particularly during the application of multiple electrical jolts, it is likely that the electricity stimulates several regions of the human brain, many of which cause intense feelings of horror, pain, or dread when activated. Widespread and simultaneous activation of many parts of the human brain may well cause the individual to sense every form of pain and horor that can possibly be experienced. Even if this were not to occur and very little current actually reached the brain, then intense pain is likely to be felt from the extensive burns and maximal muscle contractions generated by the electricity. Unlike other forms of execution, this form of electrocution likely triggers responses throughout the many pain-related regions of the brain at the same time. Other forms of execution, such as hanging or the gas chamber, both produce brain death without directly exciting brain regions and excite other tissues that cause pain in a much more limited way.

Poyner has collected this evidence to show the courts what the Commonwealth is doing to prisoners in Greensville. If the courts are willing to consider this important issue of constitutional proportions, then the Director of Corrections will effectively [illegible] unfettered discretion to execute prisoners with no constitutional limitations. The Circuit Court for Loudoun County recognized that Virginia courts must play a role in this

area. The circuit court below erred when it ruled to the contrary.

VI. ARGUMENT

This Court should reverse the trial court's refusal to permit the presentation of evidence regarding the constitutionality of death by electrocution for four reasons: (i) Poyner has never had the opportunity to have his day in court to challenge the constitutionality of the new electric chair in Greensville; (ii) no Virginia court has ever heard evidence regarding the constitutionality of Virginia's procedures and methods for execution by electrocution; (iii) no state or federal court has heard evidence on the constitutionality of electrocution since 1890; and (iv) the evidence will show that electrocution as administered in Virginia violates the prohibition against cruel and unusual punishments contained in both the United States and Virginia Constitutions.

A. Poyner Must Be Allowed An Opportunity To Challenge Virginia's New Electric Chair And New Procedures For Executions.

This Court has consistently and zealously guarded the right to one's day in court:

> The trial court's conduct gave rough treatment to Mrs. Burts' right to due process. The Constitution of our Commonwealth makes crystal clear that "[n]o person shall be deprived of his life, liberty, or property without due process of law." Va. Const. art. I, § 11. In Moore v. Smith, 177 Va. 621, 626, 15 S.E.2d 48, 49 (1941), we said the following about the nature of due process: "A day in court. an

> opportunity to be heard, is an integral part of due process of law, everywhere recognized."

Burts v. Burts, 227 Va. 618, 619-20, 316 S.E.2d 745, 746 (1984). See also Shevel's, Inc. v. Southeastern Assocs., Inc., 228 Va. 175, 183, 320 S.E.2d 339, 344 (1984)(even though appellant bore heavy burden of proof in trying to establish affirmative defense, he was entitled to his "day in court" and an opportunity to carry his burden); Blue Cross of Virginia v. Commonwealth, 218 Va. 589, 598, 239 S.E.2d 94, 98 (1977) (appellant was entitled to its day in court to challenge the constitutionality of statute, and this Court remanded case to SCC for a determination of constitutionality). The lower court's denial of Poyner's motion for an evidentiary hearing has prevented Poyner from having his day in court on his contentions about the Greensville electric chair.

On February 10, only two weeks ago, the Circuit Court for Loudoun County held that a Virginia court ought to hear evidence on this very issue:

> [L]ooking at all the Virginia cases that were cited to me . . . there's just, for some reason, some sort of a blind adherence to this rule that came up from the decision of the U.S. Supreme Court back in 1890, that it's not cruel and unusual punishment for execution by electrocution; and that that decision was made without any real findings of fact, without any real factual basis to support it.
>
> And it just seems to me that we are a country, we pride ourselves in our Constitution, both our U.S. Constitution, our State's Constitution, Virginia's Constitution, as being a viable working

> document that is supposed to work with society as society's attitudes change over periods of time.
>
> And certainly science and technology has advanced an awful lot since 1890. And I feel somewhere a Court has got to hear the evidence of what the state of the art is now on the effect of electricity on the human body during the course of execution by electrocution in Virginia.

Transcript, Commonwealth v. White, Circuit Court for Loudoun County, Crim. No. 8129 (February 11, 1993), at 4 (attached as Exhibit 12). The ruling of the Circuit Court for Loudoun County is significant because a Virginia state court has now ruled that an evidentiary hearing is necessary and appropriate to determine whether execution by electrocution in Virginia violates the state and federal constitutional prohibitions on cruel and unusual punishments. Like the defendant in White, Poyner is entitled to present the evidence to a Virginia court.

The circuit court's ruling in Loudoun is especially significant because, only 45 minutes after the conclusion of the hearing in which the court explained why it felt compelled to hear evidence about electrocution in Virginia, the Commonwealth notified the court that "it was 98% sure" that it would be dropping the capital murder charges (which had been pending for over six months) against defendant White. Indeed, on the next day, the capital murder charges were officially dropped, thereby rendering the constitutional issue and the evidentiary hearing moot. The Commonwealth thereby avoided defending the

constitutionality of Virginia's electric chair in that proceeding.

Especially in light of the Virginia court's decision in Loudoun County, Poyner's previous attempt to raise this claim in federal court is not dispositive here. The Fourth Circuit acted without the benefit of a fully developed record, and in fact, dismissed the case immediately upon receiving a notice of appeal from a very limited discovery order. Within three hours of the filing of the Commonwealth's notice of appeal to the discovery order, before the Commonwealth had filed any papers supporting its appeal, and before Poyner had the opportunity to respond in any way, the Fourth Circuit panel entered a five-page order which did not consider directly the discovery issue on appeal. Instead, the federal appeals court took the extraordinary and unprecedented step of issuing a mandate to the federal district court to dismiss Poyner's lawsuit with prejudice. At the time of this ruling, the Commonwealth's motion to dismiss was still pending in the district court. Poyner's time to file his brief in opposition to the motion had not yet run, oral argument had not yet been held, and, of course, the district court had not yet ruled on Commonwealth's motion.

The federal court's reasoning was fundamentally flawed because it presumed all forms of electrocutions to be per se constitutional in every case. But, even if electrocution is a constitutionally permissible mode of capital punishment, not

every form of electrocution is automatically constitutional.[4] Stated another way, if all forms of electrocution were presumed constitutional and if the Director of Corrections decided to execute prisoners by hooking them up to car batteries and electrocuting them over a span of hours or days, no court would be entitled to review evidence of this torture method. The irony is that Poyner has alleged a far more painful torture, but he has not been allowed his day in court to prove it.

The Circuit Court for Loudoun County was well-aware of the Fourth Circuit's decision when it was considering whether to conduct the evidentiary hearing, and it recognized that the federal decision was simply not persuasive. The persuasive effect of the federal court's order should likewise be minimal in this Court, given the extraordinary procedural history and the failure to develop a record before ruling.

The Circuit Court for Loudoun County was prepared to hear Poyner's evidence. Poyner now faces the prospect of being executed by a method that he potentially can prove to be unconstitutional before he has a forum and a "day in court" to present his evidence.

This Court, therefore, should vacate the lower court's order and remand this case for an evidentiary hearing to resolve this important constitutional challenge.

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[4]Likewise, though the death penalty has been consistently ruled constitutional, not every method of inflicting capital punishment is per se constitutional.

B. No Virginia Court Has Ever Heard Evidence On The Constitutionality Of Virginia's Procedures Or Method Of Execution By Electrocution.

The oft-cited decisions of both Virginia and federal courts which have upheld the constitutionality of death by electrocution can be categorized in one of two ways: (i) decisions that cite no authority for upholding the constitutionality of electrocution,[5] or (ii) decisions that rely on the United States Supreme Court's 1890 decision in In re Kemmler, 136 U.S. 436 (1890), or on other decisions which, in turn, rely on Kemmler.[6] No court has considered modern medical evidence of the physiological effects of intentional electrocution. In fact, no

[5] Jones v. Whitley, 938 F.2d 536, 542 (5th Cir.), cert. denied, __ U.S. __, 112 S. Ct. 8 (1991); Lindsey v. Smith, 820 F.2d 1137, 1155 (11th Cir. 1987), cert. denied, 489 U.S. 1059 (1989); Johnson v. Kemp, 759 F.2d 1503, 1510 (11th Cir. 1985), aff'd, 781 F.2d 1482 (11th Cir. 1986).

[6] McCleskey v. Kemp, 481 U.S. 279, 299 (1987) (dictum); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463 n.4 (1947); Lowenfield v. Phelps, 817 F.2d 285, 298 (5th Cir. 1987), aff'd, 484 U.S. 231 (1988) (incorporating the district court's opinion at 671 F. Supp. 423 (E.D. La. 1987)); Wilson v. Butler, 813 F.2d 664, 678 (5th Cir. 1987), cert. denied, 484 U.S. 1079 (1988); Punchess v. Wainwright, 788 F.2d 1443, 1446 (11th Cir.), cert. denied, 475 U.S. 1133 (1986); Stockton v. Commonwealth, 241 Va. 192, 402 S.E.2d 196, cert. denied, __ U.S. __, 112 S. Ct. 280 (1991); Hoke v. Commonwealth, 237 Va. 303, 237 Va. 303, 377 S.E.2d 595, cert. denied, 491 U.S. 910 (1989); Townes v. Commonwealth, 234 Va. 307, 362 S.E.2d 650 (1987), cert. denied, 485 U.S. 971 (1988); Beaver v. Commonwealth, 232 Va. 521, 352 S.E.2d 342, cert. denied, 483 U.S. 1033 (1987); Stockton v. Commonwealth, 227 Va. 124, 314 S.E.2d 371, cert. denied, 469 U.S. 873 (1984); Martin v. Commonwealth, 221 Va. 436, 271 S.E.2d 123 (1980).

Virginia court has ever considered evidence in deciding the constitutionality of electrocution.[7]

This Court first reviewed the constitutionality of electrocution in Hart v. Commonwealth, 131 Va. 726, 743-44, 109 S.E. 582, 587 (1921), which directly relied on the holding in Kemmler as the foundation for its decision. Without analysis or evidence, Hart accepted the faulty factual premises of Kemmler as true. Id. Nevertheless, Hart expressly recognized that the Virginia Bill of Rights prohibits modes of punishments that "involve torture or lingering death." Id. Poyner is prepared to prove with contemporary evidence that electrocution in Greensville does "involve torture or lingering death."

Subsequent decisions of this Court can likewise be traced back to Kemmler as the basis for finding electrocution not cruel and unusual. In Martin v. Commonwealth, 221 Va. 436, 439, 271 S.E.2d 123, 125 (1980), this Court upheld electrocution citing Kemmler and its previous decision in Hart. Stockton v. Commonwealth, 227 Va. 124, 134, 314 S.E.2d 371, 378 (1984), relied on Kemmler and the decisions in Hart and Martin. In Beaver v. Commonwealth, 232 Va. 521, 527, 352 S.E.2d 342, 345-46 (1987), this Court relied on its decisions in Martin and

[7] Of course, this is not a failure of the Virginia courts because apparently no litigant has ever attempted to proffer evidence on this issue. This Court acts on the record before it. Without a record demonstrating that the electric chair is inflicting cruel and unusual punishment, this Court is constrained to uphold the constitutionality of the punishment. Poyner, however, was wrongfully denied the opportunity to present evidence and create a record for this Court to review. Therein lies the error of the circuit court below.

Stockton. In Stockton v. Commonwealth, 241 Va. 192, 215, 402 S.E.2d 196, 209-210, cert. denied, 112 S. Ct. 280 (1991), this Court simply referred to its decision in Martin as the basis for upholding electrocution.

This Court's decisions in Hoke v. Commonwealth, 237 Va. 303, 306, 377 S.E.2d 595, 597, cert. denied, 491 U.S. 910 (1989) and Townes v. Commonwealth, 234 Va. 307, 335, 362 S.E.2d 650, 6[illegible] (1987) also descend directly from Kemmler. In Hoke, this Court relied on a variety of decisions for upholding the Virginia Death Penalty statute and cited for its authority its previous decision in Gray v. Commonwealth, 233 Va. 313, 320, 356 S.E.2d 157, 160-61, cert. denied, 484 U.S. 873 (1987). In Gray, this Court upheld the constitutionality of the death penalty statute in Virginia based on previous decisions of the Court. However, the only cited decision which related to the constitutionality of electrocution was Stockton, 227 Va. at 134, 314 S.E.2d at 378, which in turn simply relied on the Kemmler opinion. In Stockton, the appellant did not present any evidence of the effects of electrocution.

In Townes,[8] this Court relied on its decision in Pope v. Commonwealth, [illegible] Va. 114, 121-22, 360 S.E.2d 352, 357 (1987), cert. denied, [illegible] U.S. 1015 (1988). In Pope, as in Hoke, the Court relied on a variety of decisions for upholding the Virginia [illegible]; Ritter [illegible] .Supp. 1499 (S.D. Ala.

[8]This Court indicated in Townes that it would adhere to its prior rulings regarding electrocution, but the opinion expressly acknowledged the possibility of overturning those precedents in the future. Townes, 234 Va. at 335, 362 S.E.2d at 666.

death penalty statute. However, the only two decisions which discuss the constitutionality of death by electrocution were Beaver and Martin. As discussed above, Beaver relies on Martin, and Martin directly relies on Kemmler. None of these cases considered evidence of the effects of electrocution because the litigants never proffered evidence. The litigants' failure to present this Court a complete record in those cases, however, should not preclude Poyner from developing a record in this case at an evidentiary hearing.

Moreover, no Virginia court has examined Virginia's new procedures for applying multiple jolts of electricity to prisoners. No court has reviewed evidence about Virginia's electric chair -- either in Richmond or Greensville -- to determine whether Virginia is unnecessarily torturing these prisoners. Such evidence must be heard because this Court has long said that the Virginia Bill of Rights prohibits "such bodily punishments as involve torture and are inhumane." Buck v. Bell, 143 Va. 310, 319, 130 S.E. 516 (1925), aff'd, 274 U.S. 200 (1927).

Courts in other states have considered similar challenges and taken evidence related to the functioning of a specific electric chair, as opposed to electrocution generally. See Thomas v. Jones, 742 F. Supp. 598 (S.D. Ala.), cert. denied, 497 U.S. 1042 (1990); Ritter v. Smith, 568 F. Supp. 1499 (S.D. Ala. 1983), aff'd in relevant part, rev'd in part on other grounds, 726 F.2d 1505 (11th Cir.), cert. denied, 469 U.S. 869 (1984);

Buenoano v. Dugger, No. 90-473-CIV-ORL-19, 1990 WL 119637 (M.D. Fla. 1990). As these courts recognized, the holdings in Kemmler and its progeny do not prevent an action from proceeding where the claim relates to the application of electricity in a specific electric chair or in a unique manner.

C. **No Federal Or State Court Has Considered Evidence Regarding The Constitutionality Of Electrocution Since 1890.**

Virginia is not alone in relying on the antiquated Kemmler opinion without the benefit of contemporary evidence.[9] In addition, federal case law continues to depend (almost as a reflex) on Kemmler for upholding electrocution.[10] Kemmler,

[9] Johnson v. State, 584 N.E.2d 1092 (Ind.) cert. denied, 113 S. Ct. 155 (1992); State v. Black, 815 S.W.2d 166 (Tenn. 1991); Stephens v. State, 580 So. 2d 11 (Ala. 1990) cert. denied, 112 S. Ct. 176 (1991); Buenoano v. State, 565 So. 2d 309 (Fla. 1990); Teague v. State, 772 S.W.2d 915 (Tenn. 1988) cert. denied, 493 U.S. 874 (1989); Godfrey v. Francis, 308 S.E.2d 806 (Ga. 1983), cert. denied, 466 U.S. 945 (1984).

[10] McCleskey v. Kemp, 481 U.S. 279, 299 (1987) (dictum); Rummel v. Estelle, 445 U.S. 263, 288 (1980) (Powell, J., dissenting); Ingraham v. Wright, 430 U.S. 651, 667 (1977); Estelle v. Gamble, 429 U.S. 97, 102 (1976) (does not discuss death by electrocution, but states that punishments are cruel when they involve torture or a lingering death); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463 n.4 (1947); Lowenfield v. Phelps, 817 F.2d 285, 298 (5th Cir. 1987), aff'd, 484 U.S. 231 (1988) (incorporating the district court's opinion at 671 F. Supp. 423 (E.D. La. 1987)); Wilson v. Butler, 813 F.2d 664, 678 (5th Cir. 1987), cert. denied, 484 U.S. 1079 (1988); Porter v. Wainwright, 805 F.2d 930, 943 n.15 (11th Cir. 1986), cert. denied, 482 U.S. 918 (1987); Funchess v. Wainwright, 788 F.2d 1443, 1446 (11th Cir.), cert. denied, 475 U.S. 1133 (1986); Sullivan v. Dugger, 721 F.2d 719, 720 (11th Cir. 1983); Corn v. Zant, 708 F.2d 549, 563 (11th Cir. 1983), cert. denied, 467 U.S. 1220 (1984); Spinkellink v. Wainwright, 578 F.2d 582, 616 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979); Ralph v. Warden, Maryland Penitentiary, 438 F.2d 786, 789 (4th Cir. 1970), cert. denied, 408 U.S. 942 (1972)(dictum); Jackson v. Bishop, 404 F.2d 571, 577 (8th Cir. 1968).

however, cannot preclude Poyner from raising his claim in a Virginia court in 1993. The law, scientific knowledge, and society's sensibilities have evolved considerably over the last one hundred years, casting serious doubt on the basic premises of Kemmler. Nevertheless, the decision has inexplicably endured as the basis for courts throughout the country to mechanistically uphold electrocution, regardless of the particular method, as a constitutional means of execution. Modern medical and scientific evidence proves that Kemmler is no longer a viable foundation for the proposition that death by electrocution can never be cruel and unusual punishment. In addition to its outmoded science, the procedural history of Kemmler makes it even more surprising that it has endured so long without critical analysis. Because of courts' persistent reliance on Kemmler, it is important to review that decision in detail.

1. **Facts Of In Re Kemmler**

Execution by electrocution was examined by the New York state courts in People ex rel. Kemmler v. Durston, 119 N.Y. 569 (1890), and reviewed by the United States Supreme Court in Kemmler before any such executions were actually conducted in the United States. Thus, any evidence presented to the New York Court on the effects of execution by electrocution was necessarily speculative.

In Kemmler, the New York county court had reviewed the evidence presented to a court-appointed referee and ruled that it did not overcome the presumption of the constitutionality of the

legislation under the New York State Constitution (the Eighth Amendment not yet being considered applicable to the states) because the proof did not demonstrate "beyond doubt" that death by electrocution was cruel and unusual. Kemmler, 136 U.S. at 442. The standard of proof required by the court for this first challenge to electrocution, therefore, was an extraordinarily high "beyond doubt" standard, which would not apply to a contemporary challenge under the Federal or Virginia Constitutions. The New York State Supreme Court and Court of Appeals affirmed the ruling of the county court, but on the grounds that the courts were not competent to second-guess the factual findings of the legislature with respect to the constitutionality of legislation.

The New York Supreme Court stated that "there was nothing in the constitution of the government or in the nature of things giving any color to the proposition that, upon a mere question of fact involved in legislation, the judgment of the court is superior to that of the legislature itself, nor was there any authority for the proposition that in respect to such questions, relating either to the manner or the matter of legislation, the decision of the legislature could be reviewed by the court." See Kemmler, 136 U.S. at 442-43 (quoting the New York Supreme Court). The New York Supreme Court held that the presumption that the legislature had ascertained the facts necessary to determine constitutionality "was conclusive upon the court," noting that it agreed that the evidence presented did not meet the standard of

proof that would be required to overcome that presumption. See id.

The New York Court of Appeals affirmed the decision of the New York Supreme Court on similar grounds, holding that "[i]f it cannot be made to appear that a law is in conflict with the constitution, by argument deduced from the language of the law itself or from matters of which a court can take judicial notice, then the act must stand. The testimony of an expert or other witnesses is not admissible to show that in carrying out a law enacted by the legislature some provision of the constitution may possibly be violated." See id. at 443.

The United States Supreme Court affirmed the decision of the New York Court of Appeals on the grounds that, because the New York legislature had determined that electrocution did not inflict cruel and unusual punishment and the New York courts had sustained that determination, New York had not abridged Kemmler's privileges or immunities, nor denied him due process of law. Id. at 449.

2. The Kemmler Decision Is No Longer Legally Or Factually Valid

As stated previously, many courts have reflexively cited Kemmler for the proposition that death by electrocution is not cruel and unusual. However, scientific, medical and legal developments in the past 100 years have seriously eroded the precedential value of Kemmler.

First, courts no longer automatically defer on constitutional issues to state legislatures as the New York state courts and United States Supreme Court deferred to the New York legislature in Kemmler. More than twenty years ago, the Fourth Circuit Court of Appeals vindicated the authority of courts to review a legislature's decision generally, and specifically to review a legislature's enactments regarding criminal punishment. Ralph v. Warden, Maryland Penitentiary, 438 F.2d 786 (4th Cir. 1970), cert. denied, 408 U.S. 942 (1972). In Ralph, the State of Maryland argued that capital punishment was a purely legislative decision with which the judiciary should not interfere. The Fourth Circuit rejected the State's argument: "The fact that a Maryland statute authorizes capital punishment . . . does not conclusively establish the punishment's constitutionality, for the Eighth Amendment is a limitation on both legislative and judicial action." Id. at 788-89 (citing Robinson v. California, 370 U.S. 660 (1962)).

Second, to the extent that the New York courts were willing to consider evidence on the issue, Kemmler would have been required to prove "beyond doubt" that death by electrocution was cruel and unusual in order to obtain relief. Kemmler, 136 U.S. at 442. [redacted], in today's jurisprudence, courts apply a preponderance of the evidence standard for establishing an Eighth Amendment violation. See Blake v. Hall, 668 F.2d 58, 58 (1st Cir. 1981), cert. denied, 456 U.S. 983 (1982); McGill v. the court Duckworth, 726 F. Supp. 1144, 1148-49 (N.D. Ind. 1989), [illegible]

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part and rev'd in part, 944 F. 2d 344 (7th Cir. 1991), cert. denied, 112 S. Ct. 1265 (1992).

Kemmler is relied upon by courts today to dismiss claims without examining new scientific evidence demonstrating that electrocution is an excruciatingly painful and inexact process. In essence, courts have continued to rely on an opinion which relies on the judgment of a single 19th century judge who imposed a much higher standard of proof than would be imposed today. It is essential to reexamine the effect of electrocution on the human body, in light of scientific and medical advances, using a contemporary standard of proof.

Finally, scientific and medical knowledge have increased dramatically since 1890. The United States Supreme Court has recognized that the Eighth Amendment is not a static concept but "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958). See also Ralph, 438 F.2d at 790-91. Furthermore, it has recognized that what is cruel and unusual "is not fastened to the obsolete." Gregg v. Georgia, 428 U.S. 153, 171 (1976) (quoting Weems v. United States, 217 U.S. 349, 378 (1910)).

The court below, by examining modern technological evidance and applying today's legal standards, was in a position to reconsider the long-standing and obsolete assumption that electrocution is immune from constitutional review, but the court refused to do so. Nevertheless, the constitutionality of

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electrocution is not, and cannot be, a closed debate given that the first, last, and only court to consider evidence of the effects of electrocution did so in the 19th century. Moreover, the Commonwealth's recent changes in its appliances and procedures dictate at least a hearing to review the effects of those changes. Poyner is simply trying to bring electrocution, and the scrutiny thereof, into step with contemporary medical science and "evolving standards of decency."

With the help of knowledgeable experts, Poyner is prepared to prove what modern science now knows about electrocution. This knowledge includes, for example, the excruciating pain suffered by the inmate as he actually burns and cooks during the electrocution process. See, e.g., Exhibits 4, 8, 9, 10. In 1890, before the first execution by electrocution, the "experts" were unaware of this phenomenon. It was also presumed that the inmate was instantly unconscious as the electricity was applied, but Poyner's experts have exposed the fallacy of this assumption. Our understanding of electricity was in its infancy in late 19th century, and medical science has advanced exponentially over 100 years. The time has come to analyze the constitutionality of Virginia's [redacted] chair using this modern body of knowledge.

Kemmler [redacted] the decision on which all cases upholding electrocution as a constitutionally sound means of execution rely. Since that decision is flawed due to the outdated factual determinations and legal principles, all of its progeny must fall. This Court should vacate the circuit court's ruling and

remand the case so that the trial court can review evidence against the Greensville electric [illegible] principles.

D. Electrocution As Administered In Virginia Violates The Prohibition Against Cruel And Unusual Punishments Contained In Both The United States And Virginia Constitutions.

If given the opportunity at an evidentiary hearing, Poyner is prepared to present evidence that electrocution as administered in the Commonwealth of Virginia inflicts wanton and unnecessary pain, in violation of the cruel and unusual punishment clauses of the United States and Virginia Constitutions. For instance, Poyner would prove the following:

(1) The Commonwealth attempts to walk an arbitrary and undefined line between too much and too little electrical current in executing condemned persons. The Commonwealth does not know the exact amount of current needed to render the condemned person instantaneously unconscious. The Director, or his designee, essentially guesses at the voltage that should be applied to kill the condemned person without causing the prisoner to explode. The General Assembly has never reviewed the issue, and no statute prescribes how electrocutions are to be carried out in Virginia.

(2) Because of the Commonwealth's desire to avoid a gruesome mess that shocks the sensibilities of the witnesses, it takes precautions to prevent the witnesses from observing the following:

(a) massive third degree burns to the head, arms, legs, and groin;

(b) morbid drooling and vomiting;

(c) defecation and urination;

(d) convulsions;

(e) horrific grimaces and grotesquely dilated pupils; and

(f) sickening smells of cooking flesh.

(3) Virginia's operating and testing procedures for its equipment are outdated and inappropriate.

(4) The Commonwealth's technology for executing persons by administering varying numbers of jolts of electricity externally to the head is antiquated. This is demonstrated by a large number of botched executions carried out within Virginia resulting in flames and smoke erupting from a prisoner's head, excessive bleeding, and other similarly grotesque consequences.

(5) The application of electricity, as done in Greensville, inflicts excruciating pain because it overstimulates every neuron in the brain's pain center simultaneously, while cooking the remainder of the body with intense heat. This results in unnecessary and unimaginable torture.

(6) Autopsy reports and photographs of executed prisoners depict the charring of flesh in places where the electrodes are not even attached, thus indicating some kind of malfunction in the electrical circuit.

The foregoing are not vague allegations, but rather delineate specific reasons why electrocution as currently administered in Virginia is cruel and unusual punishment. They are not unsubstantiated because these allegations are derived from the Commonwealth's own internal operating procedures, from objective facts, and from qualified experts.

The trial court erred in denying Poyner an evidentiary hearing to determine whether the Commonwealth is, in fact, inflicting pain in an unnecessary and wanton fashion.

VII. CONCLUSION

No matter how unpopular a person or his cause may be, he is entitled to his day in court when he presents a serious claim of constitutional dimensions. Poyner is not attacking his convictions or his death sentences; he is not challenging the constitutionality of the death penalty. Rather, he simply asks this Court to allow him to have his day in court to present his evidence -- never before heard in any court in this Commonwealth -- that the electric chair in Greensville is unnecessarily torturing prisoners in violation of our constitutional standards. Poyner respectfully requests that this Court award him an appeal to consider this issue of great public importance.

VIII. REQUEST TO BE HEARD ORALLY IN PERSON

Poyner, by counsel, pursuant to Rule 5:17(e), respectfully requests to state the reasons in person to the Court why this Petition should be granted.

SYVASKY L. POYNER

By _____
Counsel

Alexander H. Slaughter (VSB No. 05916)
Dorothy C. Young (VSB No. 31155)
Shannon E. Sinclair (VSB No. 30588)
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William H. Wright, Jr. (VSB No. 25576)
719 West 33rd Street
Richmond, Virginia 23225
(804) 233-6646

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday *the* 10th *day of* March, 1993.

Syvasky Lafayette Poyner, Appellant,

against Record No. 930301
Circuit Court No. F-4868-4

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Williamsburg and County of James City

Upon consideration of the record, the briefs filed herein and the argument in support of the granting of an appeal, the Court has determined that there is no merit in appellant's claim that the court below erred in refusing to conduct an evidentiary hearing regarding the constitutionality of Virginia's present method of executing prisoners. Accordingly, the Court refuses the petition.

A Copy,

Teste:

David B. Beach, Clerk

By: _____
Deputy Clerk

NO. 93-6052

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SYVASKY LAFAYETTE POYNER

v.

EDWARD B. MURRAY, Director,
Virginia Department of Corrections,
ELLIS B. WRIGHT, JR., Warden,
Greensville Correctional Center,
and JOHN DOE, Executioner

IMMINENT EXECUTION
(MARCH 18, 1993)

APPLICATION FOR STAY OF EXECUTION

Alexander H. Slaughter (VSB No. 05916)
Dorothy C. Young (VSB No. 31155)
Shannon E. Sinclair (VSB No. 30588)
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(804) 233-6646

Counsel for Syvasky Lafayette Poyner

Syvasky Lafayette Poyner, by counsel, and pursuant to Rule 8 of the Federal Rules of Appellate Procedure, submits this application for a stay of his imminent execution, scheduled for March 18, 1993. Poyner requests that this Court stay his execution until such time as the United States Supreme Court has had the opportunity to decide on his Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, filed on March 11, 1993.[1] Application to the United States District Court for relief in this matter is not practicable because of the previous disposition of this case by this Court, which, upon receiving a Notice of Appeal of a discovery order, issued an Order and Mandate requiring the District Court to dismiss the entire lawsuit with prejudice. Poyner is applying to this Court for relief because Rule 23 of the Rules of the United States Supreme Court requires him to exhaust his remedies below before the Supreme Court will entertain a similar request.

I. Procedural History

In 1984, Poyner was convicted of five capital murders in the Circuit Courts of Williamsburg and James City County, Hampton, and Newport News. He was given five death sentences. The Virginia Supreme Court affirmed Poyner's convictions and sentences in a consolidated appeal on April 26, 1985. Poyner v. Commonwealth, 229 Va. 401, 329 S.E.2d 815 (1985). The United States Supreme Court denied his petition for certiorari on

[1] Exhibit 1.

October 7, 1985. Poyner v. Virginia, 474 U.S. 865 (1985) (2 cases) and 474 U.S. 883 (1985) (1 case).

Poyner filed petitions for a writ of habeas corpus in the three state circuit courts, and the petitions were dismissed in May, 1987. On April 29, 1988, Poyner's petitions for appeal of the habeas decisions were refused by the Virginia Supreme Court. (Record Nos. 870883, 870990, 870959). Poyner's petition for a writ of certiorari was denied by the United States Supreme Court on October 3, 1988. Poyner v. Bair, 488 U.S. 871 (1988).

In early 1989, Poyner simultaneously filed three petitions for a writ of habeas corpus, in essence a single consolidated petition, in the United States District Court, Eastern District of Virginia. (C.A. Nos. 89-203-N, 89-204-N, 89-205-N). The petitions were filed in the Richmond Division on January 12, 1989, and transferred to the Norfolk Division on March 15, 1989. On October 11, 1989, the Magistrate Judge recommended that the petitions be dismissed and, on December 21, 1990, the District Court dismissed the petitions. The dismissals were affirmed by the United States Court of Appeals for the Fourth Circuit on May 8, 1992. Poyner v. Murray, 964 F.2d 1404 (4th Cir. 1992). On November 2, 1992, the United States Supreme Court denied certiorari review. Poyner v. Murray, 113 S.Ct. 419 (1992).

On December 10, 1992, pursuant to 42 U.S.C. § 1983, Poyner filed the lawsuit at issue here, a class action challenging the constitutionality of the Virginia electric chair, in the United States District Court, Eastern District of Virginia (92 C.V.

815).[2] On January 19, 1993, in response to a bare Notice of Appeal relating to a discovery order, the United States Court of Appeals for the Fourth Circuit, sua sponte, issued an Order and Mandate requiring the District Court to dismiss Poyner's § 1983 action.[3] The District Court did so on January 20, 1993.[4] On February 2, 1993, Poyner submitted a Petition for Rehearing, Suggestion for Rehearing In Banc, and Petition for Recall of Mandate.[5] This Court denied that Petition on February 17, 1993.[6]

Meanwhile, on January 21, 1993, the Circuit Court for the City of Williamsburg and James City County scheduled Poyner's execution for March 18, 1993.[7] Poyner petitioned the Virginia Supreme Court for an appeal. That Petition was refused on March 10, 1993. (Record No. 930301).

On March 11, 1993, Poyner filed his Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, seeking review of the January 19, 1993 Order and Mandate requiring the District Court to dismiss Poyner's § 1983 lawsuit.

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[2]Exhibit 2.

[3]Exhibits 3 and 4.

[4]Exhibit 5.

[5]Exhibit 6.

[6]Exhibit 7.

[7]Exhibit 8.

II. Facts

Poyner has amassed a body of evidence proving that it is highly probable that a person subjected to intentional electrocution in the Virginia electric chair is neither instantaneously killed nor rendered instantaneously "unconscious" by the electric current applied to his body. Poyner's experts have explained in affidavits, and if given the opportunity will testify, that the subject of intentional electrocution in Virginia most likely suffers excruciating pain for an indeterminate period of time as he waits to expire from asphyxiation or ventricular fibrillation.[4]

As set forth in the Petition for Certiorari, the Fourth Circuit thwarted Poyner's attempt to present evidence on this issue when, on appeal of a simple discovery order and without the benefit of any briefs or arguments, it ordered the case to be dismissed. The Fourth Circuit's Order did not even address Poyner's claim concerning Virginia's particular method of electrocution; rather, the Court relied on numerous cases standing for the proposition that electrocution is not per se unconstitutional. The Fourth Circuit's Order also did not

[4]The Affidavits of Drs. Hillman, Devinsky, Ilgren, and Price are attached hereto as Exhibits 9, 10, 11, and 12. The Court will note that the affidavits of Drs. Ilgren and Price have been redacted. The redacted material relates to autopsy reports which are, for the time being, subject to a Protective Order preventing their use in any proceeding outside of the criminal proceeding Commonwealth v. Curtis Eugene White, Circuit Court of Loudoun County, Crim. No. 8129. Poyner hopes and expects that the Protective Order will be lifted or modified early next week so that he may present all of the evidence currently available to him.

consider directly the issue that was raised in the Notice of Appeal, but took the extraordinary step of directing the District Court to dismiss Poyner's lawsuit forthwith with prejudice. The Fourth Circuit's Mandate issued that same evening. Poyner's subsequent Petition for Rehearing, Suggestion for Rehearing In Banc, and Petition for Recall of the Mandate were denied.

III. Basis for Granting the Stay

Petitioner Syvasky Lafayette Poyner is scheduled to be executed in Virginia's electric chair at 11:00 p.m. on Thursday, March 18, 1993. Poyner has gathered proof that the method of execution which he is scheduled to undergo will unconstitutionally deprive him of his right to be free of cruel and unusual punishment, and a stay of execution pending disposition of his Petition for Certiorari is therefore necessary. Without a stay, he will soon be executed in a manner that is not simply unnecessarily painful, but in fact a form of torture.

While this case does not arise as a habeas corpus petition, but as an action pursuant to 42 U.S.C. § 1983, Poyner will assume for the purpose of this Application that the requirement that a habeas petitioner present "substantial grounds upon which relief might be granted" applies. Delo v. Stokes, ___ U.S. ___, 110 S.Ct. 1880, 1881 (1990); Barefoot v. Estelle, 463 U.S. 880, 895 (1983). As set forth in the Petition of Certiorari, Poyner has established gross procedural error on the part of the Fourth Circuit in treating a mere discovery order as an injunc-

subject to review pursuant to 28 U.S.C. § 1292(a)(1), and in transforming it into an opportunity to cause the case to be dismissed without a hearing. Moreover, the underlying claims made in Poyner's § 1983 Complaint are amply supported by substantial evidence, as shown by the affidavits attached as Exhibits hereto. Furthermore, as discussed just below, Poyner has engaged in no actions that should be construed as abuse of the writ. Cf. Barefoot v. Estelle, 463 U.S. at 895.

The Commonwealth will attempt to argue that Poyner is precluded by Gomez v. U.S. Dist. Court for the Northern District of California, ____ U.S. ____, 112 S.Ct. 1652 (1992) and McClesky v. Zant, ____ U.S. ____, 111 S.Ct. 1454 (1991) from raising this claim at this time. The circumstances of this case, however, differ in several salient respects from the activities that were construed as abuse of the writ in Gomez and McClesky.

While in Gomez the § 1983 plaintiff had filed his Complaint a mere four days before his scheduled execution, here, Poyner filed his Complaint on December 10, 1992, some six weeks before his execution date was set at a hearing held on January 21, 1993. Therefore, the concern expressed by the Supreme Court in Gomez with respect to the "obvious attempt at manipulation" is inapplicable. See Gomez, 112 S.Ct. at 1653.

Moreover, with respect to the applicability of McClesky through the Gomez case, Poyner's failure to raise this claim in his single previous opportunity to seek federal habeas corpus relief can be readily explained. His petitions were filed in

early 1989. At that time, the electric chair was still in Richmond, the botched executions of Wilbert Lee Evans (October 17, 1990) and Derick Lynn Peterson (August 22, 1991) had not yet occurred, the Greensville electric chair with its revamped wiring did not yet exist, and the Commonwealth had not yet instituted its policy of electrocuting prisoners with two jolts because of the likelihood that the first jolt would be insufficient to kill the condemned.[9] Thus, the "cause" prong of McClesky, 111 S.Ct. at 1470, is satisfied. The facts set forth in support of Poyner's Petition for a Writ of Certiorari and in the affidavits that accompany this Application establish the prejudice that McClesky also requires, and thus establish Poyner's right to a hearing on the issue he has raised. Id.

IV. Conclusion

For the reasons set forth above, Poyner respectfully requests that this Court grant his motion for a stay of execution pending the decision of the United States Supreme Court on his Petition for Writ of Certiorari.

Dated: March 12, 1993

RESPECTFULLY SUBMITTED,

By: Alexander H. Slaughter
Of Counsel

Alexander H. Slaughter (VSB No. 05916)
Dorothy C. Young (VSB No. 31155)
Shannon E. Sinclair (VSB No. 30588)
McGuire, Woods, Battle & Boothe
One James Center
Richmond, Virginia 23219
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[9]Exhibit 13.

Lewis F. Powell, III (VSB No. 18266)
Harry M. Johnson, III (VSB No. 29144)
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(804) 233-6646

Counsel for Syvasky Lafayette Poyner

No. 93-6052

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SYVASKY LAFAYETTE POYNER

v.

EDWARD B. MURRAY, Director,
Virginia Department of Corrections,
ELLIS B. WRIGHT, JR., Warden,
Greensville Correctional Center,
and JOHN DOE, Executioner

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of March, 1993, two copies of this Application for Stay of Execution in the above-entitled case were delivered by hand to Katherine B. Toone, Esquire, and Richard B. Smith, Esquire, Assistant Attorneys General, Attorney General's Office, Supreme Court Building, 101 North Eighth Street, Richmond, Virginia 23219.

Alexander H. Slaughter

ALEXANDER H. SLAUGHTER
DOROTHY C. YOUNG
SHANNON E. SINCLAIR
McGuire, Woods, Battle & Boothe
One James Center
Richmond, Virginia 23219
804-775-4346

Counsel for Syvasky Lafayette Poyner

FILED: March 13, 1993

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 93-6052

SYVASKY LAFAYETTE POYNER,

Petitioner,

versus

EDWARD B. MURRAY, Director, Virginia Department of Corrections, ELLIS B. WRIGHT, JR., Warden, Greensville Correctional Center, and JOHN DOE, Executioner,

Respondents.

ORDER

We have considered the application for a stay of execution filed by Syvasky Lafayette Poyner on March 12, 1993 and are of opinion the same is without merit.

Substantially all of the facts on which Poyner now relies have been public knowledge and easily available to him at least since the dissenting opinion of Justice Brennan in Glass v. Louisiana, 471 U.S. 1080 (April 29, 1985), which in turn relied upon some public factual sources dating back into the 1970s and earlier. The subject now at hand could and should have been raised by Poyner in his state and federal habeas petitions filed respectively on December 4, 1985 and in 1989, but was not raised until this current Section 1983 case was filed on December 10, 1992. We detect no

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States District Court for the Northern District of California, 60 U.S.L.W. 3733 (1992) (per curiam).

While the complaints about the electric chair at Greensville could have been raised at any time since 1991 when the chair was installed and were not, they are unproven and even if true are based on no factual premise which would show that the method of Poyner's execution would involve "cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely." Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 464 (1947).

It is accordingly ADJUDGED and ORDERED that the said application for a stay of execution shall be, and the same hereby is, denied.

With the concurrences of Judge Wilkinson and Judge Sprouse.

H.E. Widener, Jr.
United States Circuit Judge
For the Court

A True Copy, Teste:
Herbert R. Hoffman, Clerk
By [illegible]
Deputy Clerk

59

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
[illegible]

SYVASKY L. POYNER,

Plaintiff,

v. case no _____

COMMONWEALTH OF VIRGINIA, etc., et al.,

Defendants.

Before: HONORABLE ROBERT R. MERHIGE, JR.,
United States District Judge

December 10, 1992
Richmond, Virginia

IN OPEN CHAMBERS

Gilbert Frank Halasz, RPR
HALASZ & HALASZ
Court Reporters
P. O. Box 223
Richmond, VA 23202
(804) 741-5200

order, copies of which have been given, I think, at least the first [illegible] out what is requested.

This I think is a material part of it.

"It is adjudged and ordered that defendants are mandatorily enjoined, to permit Gilbert F. Halasz, this court's reporter, for purpose of supervising Charles Bradshaw, both of whom shall be permitted entry into the execution chamber of the Greensville Correctional Center at 9:00 p.m. on Thursday, December 10, or as soon thereafter as they may arrive, 1992 for the purpose of inspecting and videotaping with audio the execution of Timothy Bunch. Further adjudged and ordered that the execution be performed with condemned prisoner's face visible during the execution, providing same is agreeable to the condemned prisoner, who shall be asked to state his acquiescence or refusal in the presence of the aforementioned Gilbert F. Halasz. It is further adjudged and ordered that said Charles Bradshaw for the purpose of videotaping the execution be placed in a position whereby the camera would be able to observe the condemned prisoner's face.

There shall be no videotaping of any person other than the condemned prisoner.

In so far as possible, such taping shall be limited to condemned prisoners face.

Following said execution, videotape shall be placed [illegible] same to the Court prior to the viewing of said tape.

Further adjudged and ordered that the plaintiff may have one representative present to observe any autopsy, not participate in, but observe any autopsy that may be performed on the said Timothy Bunch.

I would ask counsel for the Commonwealth, you have been very cooperative, to notify the appropriate authorities of the entry of this order and see to it that a copy be delivered as quickly as possible. We will have an attested copy to give to Mr. Halasz to present when he arrives.

It follows that the tape will be sealed, kept under seal until the further order of the Court.

I don't know as there is anything else we can do.

MR. SLAUGHTER: May I address the Court?

THE COURT: Yes, sir.

MR. SLAUGHTER: Your Honor limited, as I heard the order, the videotaping to the face of Mr. Bunch. I believe it is contemplated if they got more of the body it will show --

THE COURT: Well, I only did what I thought you said.

MR. SLAUGHTER: No.

THE COURT: What I thought you said you wanted.

MR. SLAUGHTER: I appreciate that, Your Honor, but if

UNITED STATES DISTRICT COURT
[illegible]
Richmond Division

SYVASKY L. POYNER, on behalf of himself and all others similarly situated,

Plaintiffs,

v.

EDWARD B. MURRAY, Director, Virginia Department of Corrections, ELLIS B. WRIGHT, Warden, Greensville Correctional Center, and JOHN DOE, Executioner,

Defendants.

Civil Action No.92-CV-815

REQUEST TO PERMIT ENTRY
UPON LAND FOR VIDEOTAPING AND INSPECTION

Plaintiff Syvasky L. Poyner, on behalf of himself and all others similarly situated, by counsel, pursuant to Rule 34(a)(2) of the Federal Rules of Civil Procedure, requests an order directing defendants:

1. To permit those persons designated by this Court, on receipt of consent to the same from Charles S. Stamper, entry into the execution chamber of Greensville Correctional Center one hour before the execution of Charles S. Stamper for the purpose of videotaping, with audio, Mr. Stamper's execution.

2. To permit plaintiffs' expert neuropathologist Dr. E. B. Ilgren entry into the medical examiner's office for the purpose of inspecting and observing any autopsy to be performed on Charles S. Stamper and to permit Dr. Ilgren to perform the routine and ordinary autopsy procedures on the brain described in Dr. Ilgren's attached affidavit.

Respectfully submitted,

SYVASKY L. POYNER,
on behalf of himself
and all others similarly situated

By _____
Counsel

Alexander H. Slaughter
Virginia State Bar No. 05916
Dorothy C. Young
Virginia State Bar No. 31155
Shannon E. Sinclair
Virginia State Bar No. 30588
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Harry M. Johnson, III
Virginia State Bar No. 29144
Sean P. McMullen
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951 Byrd Street
(804) 788-8200

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing request to be delivered by hand and telefaxed on January 14th, 1993, to:

John H. McLees, Esq.
Assistant Attorney General
Office of the Attorney General
101 North Eighth Street
Richmond, Virginia 23219
Counsel to Defendants.

EXHIBIT
A

AFFIDAVIT OF E.B. ILGREN, M.D.

E.B. Ilgren, M.D., being duly [illegible] deposes and says as follows:

1. My name is E.B. Ilgren; M.D. I am a neuropathologist and am currently a member of the Faculty of Biology and Agricultural Sciences and Subfaculty of Biochemistry, University of Oxford. I received my M.D. from Hahnemann Medical University in 1974. I was board certified in Anatomic Pathology by the American College of Pathology in 1976. In 1982, I was certified in Neuropathology by the Royal College of Pathology in the United Kingdom.

2. I have been asked by the plaintiffs in Poyner v. Murray, et al., to consult with them on the effects of electricity on the human body.

3. I have reviewed the autopsy reports of Wilbert Lee Evans and Derrick L. Peterson prepared by the Medical Examiner for the Commonwealth of Virginia. The reports do not provide complete information on the effects of electricity on the bodies of people who have been executed in Virginia's electric chair.

4. To analyze of the effects of electricity on the human body, it would be beneficial to observe the autopsy of the next inmate executed in Virginia's electric chair.

5. Determining the condition of the human brain following an execution in Virginia's electric chair will provide information regarding the effects of electrocution on the human body.

6. Gross examination of the brain does not necessarily rule out abnormalities in the cellular structure of the brain. Microscopic examination of the brain tissue is required to rule out important cellular changes in the brain tissue.

7. The following routine post-mortem examination of the brain in necessary to determine the condition of the brain tissue:

a. The skull cap is removed in the usual fashion and the brain is gently lifted from its bony vault after the brain stem is transected with a scalpel at the base of the skull.

b. The brain is lowered whole and immersed in a vat containing no less than six times its volume weight of 10% firmalin.

c. A string is passed beneath the vessels of the circle of Willis to suspend the brain, upside-down, within the vat.

d. The brain is thus fixed for no less than four weeks whereupon it is examined in the routine way.

e. Examination includes weighing the whole brain and then obtaining the individual weights and dimensions of the cerebrum, brain stem and cerebellum.

f. All three of the above are then carefully sectioned in the coronial plane at the following intervals by means of a hand-held knife: cerebrum, one-half inch; brainstem, one-fourth to one-eighth inch; cerebellum, one-fourth inch.

g. The "coronal" slices are examined for gross abnormalities and then the following standard blocks (2 inches x 2 inches) are taken bilaterally: $A_{7,5,2,1}$; $P_{1,3,5}$; Basal Ganglia; Thalamus; Hypothalamus; Pituitary Gland; Cerebellum, vermis and hemispheres; midbrain, pons, medulla (upper, middle and lower).

h. The above sections are then embedded in parafin wax using routine methods, sectioned by microtome at 5-10 microns, and stained.

i. The sections thus produced are then examined under a light microscope to assess the morphological appearance of gray and white matter.

8. The method of post-mortem examination of the brain set forth above is a routine neuropathological examination to detect cellular irregularities in the brain.

E B Ilgren MD
E.B. Ilgren, M.D.

State of Pennsylvania
County of Montgomery

Subscribed and sworn before me this 14TH day of January, 1993.

Joseph A. Reale
NOTARY PUBLIC

My commission expires:

NOTARIAL SEAL
JOSEPH A. REALE, Notary Public
Lower Merion Twp., Montgomery Co.
My Commission Expires Dec. 12, 1994

for
MS
Shannon Sinclair

U.S. Department of Justice
Office of Justice Programs
Bureau of Justice Statistics

All Team

Bureau of Justice Statistics Bulletin

Capital Punishment 1991

By Lawrence A. Greenfeld
BJS Statistician

Eight States executed 14 prisoners during 1991, bringing the total number of executions to 157 since 1976, the year that the U.S. Supreme Court reinstated the death penalty. Those executed during 1991 had spent an average of 9 years and 8 months awaiting execution, about 1 year and 9 months longer on average than the 23 persons executed during 1990.

During 1991, 265 prisoners were received by State prison systems and 1 prisoner entered the Federal prison system under a sentence of death from the courts. During the year, 106 persons had their death sentence vacated, 2 had their sentence commuted, 1 received a conditional pardon by the governor, and 7 died while under a death sentence. At yearend, 34 States and the Federal prison system reported a total of 2,482 prisoners under sentence of death, a 5.8% increase over the number held at the end of 1990. All prisoners under sentence of death on December 31, 1991, had been convicted of murder. The median time since the death sentence was imposed for the 2,482 prisoners was 5 years.

About 7 out of 10 offenders under sentence of death for whom criminal history data were available had a prior felony conviction, about 1 in 12 had a prior homicide conviction. About 2 in 5 condemned prisoners had a criminal justice status at the time of the capital offense. Half of these were on parole; the rest were in prison, on escape from prison, on probation, or had charges pending against them. Nearly 15% of those sentenced to death between 1988 and 1991 had received 2 or more death sentences.

Status of the death penalty, December 31, 1991

Executions during 1991	
Texas	5
Florida	2
Virginia	2
Georgia	1
Louisiana	1
Missouri	1
North Carolina	1
South Carolina	1
Total	14

Number of prisoners under sentence of death	
Texas	340
Florida	311
California	301
Pennsylvania	137
Illinois	132
Oklahoma	125
Alabama	119
Ohio	111
Georgia	101
26 other jurisdictions	805
Total	2,482

Jurisdictions without a death penalty
Alaska
District of Columbia
Hawaii
Iowa
Kansas
Maine
Massachusetts
Michigan
Minnesota
New York
North Dakota
Rhode Island
Vermont
West Virginia
Wisconsin

Figure 1

October 1992

This Bulletin marks the 62nd consecutive year that the Federal Government has published statistics on executions. Since 1953 the Federal Government has also provided data on persons under sentence of death, expanding in recent years to include criminal history information and whether the condemned had a status with the criminal justice system at the time of the capital offense. Data are collected prospectively on each case after entering a death-sentence status so that removals of a death sentence, executions, and other changes in status are systematically followed. The series also tracks changes in statutes relating to the death penalty and major cases decided which may affect the application of the death penalty.

Computerized data on individuals who have been sentenced to death since 1973 are available to the public through the BJS-sponsored National Archive of Criminal Justice Data.

I would like to thank the many persons in State and Federal corrections agencies and offices of State attorneys general who make this annual report possible.

Steven D. Dillingham, Ph.D., LL.M
Director

The majority, 1,464 (59.0%), of those under sentence of death were white; 982 (39.6%) were black; 23 (0.9%) were American Indian; and 13 (0.5%) were Asian. Hispanic prisoners (184) accounted for 7.4% of those under a death sentence. Thirty-four (1.4%) of those under a death sentence were female. The median age of all inmates under a death sentence was 34 years and the median age at which they had been sentenced to death was 29 years.

Oregon — Clarified the role of alternate jurors during the sentencing phase of a capital trial if a juror who was present during the guilt phase is unable to serve; revised weighing the "issues" relevant to the appropriateness of the death penalty; instituted an automatic stay of execution if the defendant seeks a review from the U.S. Supreme Court; and enumerated new procedures to be used on remand during a resentencing proceeding if prejudicial error is determined to have occurred during sentencing.

Utah — Changed the term "first-degree murder" to "aggravated murder" and changed the term "second-degree murder" to "murder" and, in the section describing aggravated circumstances in capital felony sentencing proceedings, changed the word "murder" to "homicide."

Virginia — Added murders resulting from forcible sodomy or attempted forcible sodomy to the listing of capital murder circumstances.

Method of execution

At yearend 1991 lethal injection (22 States) and electrocution (12 States) were the most common methods of execution authorized (table 2). Six States authorized lethal gas, three States, hanging, and two States, a firing squad. Nine States authorized more than one method — lethal injection and an alternative method — generally at the election of the condemned prisoner or based on the date of sentencing.

Some States have stipulated an alternative to lethal injection, anticipating that it may be found unconstitutional. Each of the other four methods, previously challenged on eighth amendment grounds as cruel and unusual punishment, has been found to be constitutional. The method of execution for Federal offenders is that of the State in which the execution takes place.

Automatic review

Of the 36 States with capital punishment statutes at yearend 1991, 34 provided for review of all death sentences regardless of the defendant's wishes. Arkansas had no specific provisions for automatic review, and Ohio (ORC Section 2929.05) provides for review by the Court of Appeals and the Supreme Court "upon appeal." The Federal death penalty procedures do not provide for automatic review after a sentence of death is imposed. While most of the 34 States authorized an automatic review of both the conviction and sentence, Idaho, Indiana, and Montana require review of the sentence only. In Idaho review of the conviction must be appealed [illegible] of the conviction. Typically the review is undertaken regardless of the defendant's wishes and is conducted by the State's highest appellate court. If either the conviction or the sentence is vacated, the case may be remanded to the trial court for additional proceedings or for retrial. In resentencing, the death sentence may be reimposed.

Table 2. Method of execution, by State, 1991

Lethal injection	Electrocution	Lethal gas	Hanging	Firing squad
Arkansas[a,b]	Alabama	Arizona	Montana[a]	Idaho[a]
Colorado[a,c]	Arkansas[a,b]	California	New Hampshire[a,d]	Utah[a]
Delaware	Connecticut	Colorado[a,c]	Washington[a]	
Idaho[a]	Florida	Maryland		
Illinois	Georgia	Mississippi[a,e]		
Louisiana	Indiana	Missouri[a]		
Mississippi[a,e]	Kentucky	North Carolina[a]		
Missouri[a]	Nebraska			
Montana[a]	Ohio			
Nevada	South Carolina			
New Hampshire[a,d]	Tennessee			
New Jersey	Virginia			
New Mexico				
North Carolina[a]				
Oklahoma				
Oregon				
Pennsylvania				
South Dakota				
Texas				
Utah[a]				
Washington[a]				
Wyoming				

Note: Federal executions are to be carried out according to the method of the State in which they are performed.
[a]Authorizes 2 methods of execution.
[b]Arkansas authorizes lethal injection for those whose capital offense occurred after 7/4/83; for those whose offense occurred before that date, the condemned prisoner may select lethal injection or electrocution.
[c]Colorado authorizes lethal gas for those whose crimes occurred before 7/1/88 and lethal injection for those whose crimes occurred on or after 7/1/88.
[d]New Hampshire authorizes hanging only if lethal injection cannot be given.
[e]Mississippi authorizes lethal injection for those convicted after 7/1/84; execution of those convicted prior to that date is to be carried out with lethal gas.

Table 3. Minimum age authorized for capital punishment, yearend 1991

Age less than 18	Age 18	None specified
Alabama (16)	California	Arizona
Arkansas (14)[a]	Colorado	Delaware
Georgia (17)	Connecticut[b]	Florida
Indiana (16)	Illinois	Idaho
Kentucky (16)	Maryland	Montana
Louisiana (16)	Nebraska	Pennsylvania
Mississippi (16)[c]	New Jersey	South Carolina
Missouri (16)	New Mexico	Washington
Nevada (16)	Ohio	
New Hampshire (17)	Oregon	
North Carolina (17)[d]	Tennessee	
Oklahoma (16)	Federal system	
South Dakota[e]		
Texas (17)		
Utah (14)		
Virginia (15)		
Wyoming (16)		

Note: Ages at the time of the capital offense were indicated by the offices of the State attorneys general.
[a]See Arkansas Code Ann. 9-27-318(c)(1)(Repl. 1991).
[b]See Conn. Gen. Stat. 53a-46a(g)(1).
[c]Minimum age defined by statute is 13, but effective age is 16 based on an interpretation of U.S. Supreme Court decisions by the State attorney general's office.
[d]Age required is 17 unless the murderer was incarcerated for murder when a subsequent murder occurred, the age then may be 14.
[e]Age 10, but only after a transfer hearing to try a juvenile as an adult.

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COMMONWEALTH OF VIRGINIA

NINTH JUDICIAL CIRCUIT

CHARLES CITY COUNTY
GLOUCESTER COUNTY
JAMES CITY COUNTY
KING AND QUEEN COUNTY
KING WILLIAM COUNTY
MATHEWS COUNTY
MIDDLESEX COUNTY
NEW KENT COUNTY
YORK COUNTY
CITY OF POQUOSON
CITY OF WILLIAMSBURG

November 19, 1992

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Mr. Alexander H. Slaughter
Ms. Catherine N. Currin
McGuire, Woods, Battle & Boothe
One James Center
Richmond, Virginia 23219

Re: Commonwealth v. Syvasky Lafayette Poyner
Circuit Court for the City of Williamsburg and County of James City
File No. 4868-A

Dear Ms. Currin and Gentlemen:

I have received communications from Mr. Fairbanks and Ms. Toone, Assistant Attorney General, indicating that they have no objection if I continue in the case for the purpose of fixing the execution date; however, I have had no response from Ms. Currin and Messrs. Slaughter and Johnson. Therefore, in order to prevent continued delay, I am recusing myself, and Judge John M. Folkes, of the Ninth Judicial Circuit, will sit in the matter. I request that each of you advise Judge Folkes of your earliest available date for the hearing.

Yours very truly,

G. Duane Holloway
Judge

GDH:mlw
cc: The Honorable John M. Folkes
The Honorable Randolph T. West
The Honorable Nelson T. Overton
The Honorable Helene S. Ward, Clerk
Mr. Milton Brown, Deputy Attorney General
Ms. Katherine B. Toone, Assistant Attorney General

71

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COMMONWEALTH OF VIRGINIA

NINTH JUDICIAL CIRCUIT

COURTS
CHARLES CITY COUNTY — MATHEWS COUNTY
GLOUCESTER COUNTY — MIDDLESEX COUNTY
JAMES CITY COUNTY — NEW KENT COUNTY
KING AND QUEEN COUNTY — YORK COUNTY
KING WILLIAM COUNTY — CITY OF POQUOSON
CITY OF WILLIAMSBURG

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December 8, 1992

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RECEIVED
DEC 14 1992

Re: Commonwealth v. Syvasky Lafayette Poyner - File No. 4868-A
Circiut Court for the City of Williamsburg and James City County

Dear Ms. Currin and Gentlemen:

Following Judge Holloway's letter to you of November 19, 1992, in reference to the above captioned case, I expected to be provided with your available dates. No communication has been forthcoming. I suggest that you contact my secretary, Linda J. Mason, (804) 693-1358, by December 21, 1992, with your available dates for a hearing in Williamsburg for the purpose of fixing the date of execution. If the Court does not recieve your dates by December 21, 1992, it will be necessary for the Court to proceed sua sponte, i.e., you will be notified of the hearing dated selected by the Court.

Mr. Harry M. Johnson, III
Mr. Alexander H. Slaughter
Ms. Catherine N. Currin
Page Two
December 8, 1992

Would you kindly attend to this matter forthwith. Thank you very much.

Very truly yours,

John M. Folkes, Judge

JMF:lm

CC: The Honorable Randolph T. West
The Honorable Nelson T. Overton
The Honorable Helene S. Ward, Clerk
Mr. Milton Brown, Deputy Attorney General
Ms. Katherine B. Toone, Assistant Attorney General
Mr. Richard B. Smith, Assistant Attorney General

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RECEIVED
DEC 21 1992
DEPUTY ATTORNEY GENERAL

December 21, 1992

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RE: Commonwealth v. Syvasky Lafayette Poyner
File No. 4868-A Circuit Court for the
City of Williamsburg and James City County

Dear Ms. Currin and Gentlemen;

Following Judge Folkes' letter to you of December 8, 1992, and your response of December 16, 1992 coupled with a transmittal of your available dates, Judge Folkes has selected the date of January 21, 1993 at 11:00 a.m. for the purpose of setting an execution date in the above referenced matter in the Circuit Court of the City of Williamsburg and County of James City, Virginia. A transportation order has been prepared providing for Mr. Poyner's presence on the above referenced trial date. Thank you for your cooperation in these matters.

Very truly yours,

George C. Fairbanks IV

George C. Fairbanks, IV.
Commonwealth Attorney

GCFIV/epm

V I R G I N I A :

AND JAMES CITY COUNTY

COMMONWEALTH OF VIRGINIA	:	
V.	:	File No. 4868-A
SYVASKY L. POYNER	:	

MOTION FOR CONTINUANCE

Syvasky Lafayette Poyner, by counsel, respectfully moves this Court to continue the date scheduled for a hearing to set his execution date.

In support of this motion counsel states:

1. This Court has scheduled a hearing on January 21, 1993 to set Mr. Poyner's execution date.

2. On December 10, 1992, Mr. Poyner, on behalf of himself and all others similarly situated, filed a Complaint in the United States District Court for the Eastern District of Virginia, Richmond Division, against Edward W. Murray, Director, Virginia Department of Corrections, Ellis B. Wright, Jr., Warden, Greensville Correctional Center, and John Doe, Executioner, seeking permanent injunctive and declaratory relief pursuant to 42 U.S.C. § 1983 with respect to the unconstitutional procedure and means utilized by the defendants and prescribed by the law of the Commonwealth of Virginia for executing prisoners in Virginia. See Complaint, Civil Action No. 92-CV-815, Exh. A.

3. Mr. Poyner's § 1983 lawsuit centers on an issue of [illegible] public and [illegible] whether the Commonwealth of Virginia is executing prisoners in a cruel and unusual manner in violation of the Eighth Amendment to the United States Constitution. As the Attorney General's Office itself has noted in a Motion for Enlargement of Time to respond to the Complaint, it "raises issues of substantial public interest." Motion for Enlargement of Time, Exh. B, at ¶ 2. The federal District Court has certified the action as a class action, and has designated Mr. Poyner the class representative. Final adjudication on the merits of Mr. Poyner's federal claim will have a direct impact on the subject of the hearing currently scheduled in this Court for January 21, 1993.

4. Mr. Poyner and the plaintiff class are represented in the § 1983 action by Hunton & Williams and McGuire, Woods, Battle & Boothe, which are committed to devoting the necessary resources for the proper adjudication of the issues raised in the Complaint.

5. Mr. Poyner intends to prove that the factual premises relied upon by earlier courts to uphold execution by electrocution as constitutional have been discredited by modern science. It is his contention that currently available medical and scientific evidence will demonstrate that "[e]xecution by electrocution results in the wanton and unnecessary infliction of pain," Complaint, Exh. A, at ¶ 15, and that the Commonwealth has deliberately sanitized the execution process to cover up the

"painful nature of electrocution, the antiquated technology [illegible] the primitive [illegible] machinery, the failure to use personnel qualified by education or training to carry off the executions, the number of botched executions and the certainty of pain." Complaint, Exh. A, at ¶ 46.

6. Mr. Poyner's civil lawsuit is not intended to interrupt actions taken by the Commonwealth pursuant to its legitimate duty to carry out lawful orders. Nor is his federal claim a dilatory attempt to postpone indefinitely his execution. Indeed, Mr. Poyner has requested expedited discovery in his District Court action and has sought expedited review of the related proceedings that are pending before the Fourth Circuit. See letter from Alexander H. Slaughter to Assistant Attorney General John H. McLees, dated January 7, 1993, Exh. C;[1] Plaintiff's Motion For Expedited Discovery, Civil Action No. 92-CV-815, Exh. D (to be filed today); Appellee's Motion for Expedited Briefing Schedule, No. 92-7228, Exh. E. The Attorney General's Office has declined to agree to the expediting of the appellate proceedings as proposed by Mr. Poyner, and is apparently making no effort to speed up the federal proceedings despite the immediacy of Mr. Poyner's execution scheduling hearing and the impending execution of a class member, Mickey Wayne Davidson,

[1]Counsel is, as of this writing, awaiting the Attorney General's reply to its proposed expedited discovery schedule in the underlying case pending in the District Court.

which has been scheduled for February 3, 1993. See Appellants' Fourth Circuit Docketing Statement, Petition for Writ of Habeas Corpus, Assistant Attorney General John H. McLees, dated January 6, 1993, Exh. G. The urgency of the situation has been heightened by Governor Wilder's decision this past weekend to deny clemency to Charles S. Stamper, and to set an execution date of January 19, 1993 for him.

8. Mr. Poyner requests a continuance of the January 21st hearing before this Court to preserve judicial resources and to permit adequate preparation for the pending federal trial. Mr. Poyner is utilizing all available means to expedite his litigation in the federal court. The setting of an execution date that might interfere with the prosecution of that lawsuit would result in costly litigation that could only detract from the District Court's consideration of the important constitutional question as to the legitimacy of Virginia's method of execution.

9. This Court has discretion as to the timing of the hearing to set an execution date. Moreover, the Court need not accept whatever execution date the Commonwealth's Attorney may suggest. Instead, the Court has discretion to determine what date is appropriate. In just the past year, the Circuit Courts of Buchanan and Henrico Counties have exercised that discretion in the cases of Roger Coleman and Herbert Bassette to refuse the dates offered by the Commonwealth in favor of dates that would allow for mature and deliberate consideration of pending

litigation or completion of clemency investigations. See Affidavits of Kathleen Behan and Patricia [illegible], Exhs. H and I. At the time of his hearing, Mr. Coleman had pending a successive habeas corpus petition that the court believed presented serious issues. In setting the execution date, then, the court allowed sufficient time for thoughtful and unhurried consideration of Mr. Coleman's petition. The reasons for deferral advanced in and accepted by the court in Mr. Coleman's case also argue for allowing Mr. Poyner to complete his pending litigation.

10. The Attorney General has referred to the grave public importance of the § 1983 action, and both sides obviously contemplate that significant labor will precede any hearing on the merits of that case. Mr. Poyner has already initiated the steps necessary to secure expeditious handling of the matter. These facts should inform this Court's exercise of its discretion in deciding whether to continue the January 21st hearing and, if the Court declines to continue that hearing, then in setting an execution date.

WHEREFORE, Mr. Poyner respectfully requests that this Court enter an order continuing the hearing to determine Mr. Poyner's execution date indefinitely until Mr. Poyner's lawsuit in the United States District Court For the Eastern District of Virginia, Richmond Division, has been adjudicated. In the alternative, if this Court should decide not to continue the hearing set for January 21, 1993, Mr. Poyner respectfully

requests that this Court set an execution date sufficiently far in the future as to enable Mr. Poyner to have a full and fair trial on the merits with regard to the important constitutional questions raised in his federal lawsuit.

Respectfully submitted,

SYVASKY L. POYNER

By _____
Of Counsel

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ATTORNEYS FOR THE PLAINTIFF

FILED
JAN - 8 1992
CLERK, U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

HERBERT R. BASSETTE, JR. Plaintiff, v. COMMONWEALTH OF VIRGINIA, EDWARD W. MURRAY, Director, Virginia Department of Corrections, D.R. LAWSON, Acting Warden, Greenville Correctional Center, MARY SUE TERRY, Attorney General of Virginia, and JOHN DOE, Executioner, Defendants.	)	CIVIL ACTION NO. 3:92CV11

PETITION FOR DECLARATORY RELIEF, AND TEMPORARY AND PERMANENT INJUNCTIVE RELIEF

Herbert R. Bassette, Jr. ("Bassette"), by counsel, for his bill of complaint for declaratory relief and a temporary and permanent injunction against Edward W. Murray, Director of Virginia Department of Corrections ("Murray"), D.R. Lawson, Acting Warden Greenville Correctional Center ("Lawson"), Mary Sue Terry, Attorney General of Virginia ("Terry") and John Doe, Executioner ("Doe") states as follows:

JURISDICTION

(1) This is an action, pursuant to 42 U.S.C. § 1983, to redress the imminent deprivation, under color of a law of the Commonwealth of Virginia, of a right secured to Bassette by the eighth and fourteenth amendments to the Constitution of the United States.

(2) Jurisdiction is conferred on this Court by 28 U.S.C. § 1343.

JAN - 8 1992
CLERK, U.S. DISTRICT COURT
RICHMOND, VA

PA

(3) Plainuff, Bassette, at all times relevant to this suit, has been a resident of Virginia and a citizen of the United States.

(4) At all times relevant to this suit, defendant Murray has been the director of the Virginia Department of Corrections. He has acted and will act in such capacity as the agent, servant, and employee of the defendant Commonwealth of Virginia in all actions he has taken and will take in deprivation of Bassette's constitutional rights. He is sued individually and in his official capacity.

(5) At all times relevant to this suit, defendant Lawson has been the Acting Warden of Greenville Correctional Center. He has acted and will act in such capacity as the agent, servant, and employee of the defendant Commonwealth of Virginia in all actions he has taken and will take in deprivation of Bassette's constitutional rights. He is sued individually and in his official capacity.

(6) At all times relevant to this suit, defendant Terry has been the Attorney General of Virginia. She has acted and will act in such capacity as the agent, servant, and employee of the defendant Commonwealth of Virginia in all actions she has taken and will take in deprivation of Bassette's constitutional rights. She is sued individually and in her official capacity.

(7) At all times relevant to this suit, defendant Doe has been an employee of the Department of Corrections of Virginia. He has acted and will act in such capacity as the agent, servant, and employee of the defendant Commonwealth of Virginia in all actions he

individually and in his official capacity.

(8) At all times relevant to this suit defendant Commonwealth of Virginia employed defendants, Murray, Lawson, Terry and Doe.

FACTUAL ALLEGATIONS

(9) On August 22, 1980, Bassette was convicted of capital murder in the Circuit Court for Henrico County. Bassette's punishment was fixed at death.

(10) On November 19, 1980, the Circuit Court for Henrico County accepted the jury verdict and sentence of death.

(11) In November of 1991, the Commonwealth of Virginia sought and obtained an Order from the Circuit Court for Henrico County to execute the sentence imposed upon Bassette.

(12) Bassette is scheduled to be executed on January 23, 1992.

(13) The Commonwealth of Virginia, and its agents Murray, Lawson, Terry and Doe, have expressed their intention to execute Bassette by electrocution pursuant to Virginia Code § 53.1-233 (1991).

(14) The method of execution chosen by the defendants violates the prohibition against cruel and unusual punishments found in the Eighth and Fourteenth Amendments to the United States Constitution.

(15) Electrocution, heralded as providing an instantaneous and humane death when invented in the late nineteenth century, provides neither.

Rather, the subject experiences great pain and agony as electricity passes through his body, raising his bodily fluids to the temperature of boiling water and searing third and fourth degree burns into his flesh.

(17) Death by electrocution is tantamount to being burned or cooked alive and, thus, is torturous and barbaric.

(18) When administered properly lethal injection provides a significantly more humane and less painful death than electrocution.

(19) Virginia's electric chair is antiquated and obsolete and it is likely that the electric chair will malfunction during the execution of Bassette. Moreover, the Commonwealth of Virginia provides inadequate training and utilizes unqualified personnel in the performance of executions. This increases the likelihood of human error and a lingering, tortuous death.

(20) Virginia's electric chair is mutilating the bodies of the people it kills. This is evidenced by at least two recent executions that were botched, the executions of Derrick Peterson and Wilbert Lee Evans.

(21) Both Peterson and Evans endured brutal, painful deaths because of the inability of Virginia's electric chair to provide an effective current of electricity to vital parts of their bodies.

(22) That these executions were unnecessarily torturous is evidenced by the observations of eye witnesses. These witnesses recounted in gruesome detail bleeding that

stain of his own bodily fluids.

(23) After the botched Evans execution, the Commonwealth of Virginia attempted to repair the chair, but to no avail. The second execution thereafter, that of Peterson, was also doomed to be a macabre event. Peterson was not killed by the first jolts of electricity that the Commonwealth sent surging through his body. It took the Commonwealth over twelve minutes to succeed in ending Peterson's life. Peterson assuredly endured unimaginable pain during this period. During that entire time, witnesses observed him wheezing and moaning.

(24) The electric chairs of other states, similar in design and age to Virginia's, also have experienced repeated malfunctions, with attendant prisoner suffering and torture.

(25) The proposed use of Virginia's electric chair to carry out the execution of Bassette's sentence by the Commonwealth, Murray, Lawson, Terry and Doe, all acting under color of state law and authority, has deprived and will deprive Bassette of rights secured to him by the Constitution of the United States, including his Eighth Amendment right of freedom from cruel and unusual punishment.

(26) This Petition is based upon the accompanying Memorandum, Exhibits and Affidavits.

WHEREFORE, Plaintiff Herbert R. Bassette, Jr. prays for the following relief from this Court:

1) That this Court temporarily enjoin the execution of Bassette's sentence by electrocution until a full hearing can be held to determine that the use of Virginia's electric

chief violates the proscriptions of the eighth and fourteenth amendments to the United States Constitution;

2) That after a full hearing on the merits, this Court declare that Virginia's electric chair fails to provide an instantaneous and humane method of execution and violates the proscriptions of the eighth and fourteenth amendments to the United States Constitution and permanently enjoin the Commonwealth, Murray, Lawson, Terry and Doe from fulfilling Bassette's sentence by use of Virginia's electric chair;

3) And for such other and further relief as this Court may deem appropriate under the circumstances.

By: _____
Counsel

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Counsel for Herbert R. Bassette, Jr.

FILED
JAN 17 1992
CLERK, U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

HERBERT R. BASSETTE, JR. Plaintiff, v. COMMONWEALTH OF VIRGINIA, EDWARD W. MURRAY, Director, Virginia Department of Corrections D.R. LAWSON, Acting Warden, Greenville Correctional Center, MARY SUE TERRY, Attorney General of Virginia, and JOHN DOE, Executioner, Defendants.	Civil Action No. 3:92CV11

ORDER

Upon motion of the Plaintiff by Counsel and with the consent of Defendants, Plaintiff's action under 42 U.S.C. § 1983 shall be and the same is hereby DISMISSED with prejudice.

By agreement of the parties, each party will bear its own costs.

Let the clerk send a copy of this Order to all counsel of record.

/s/
UNITED STATES DISTRICT JUDGE

Dated 1-17-92

AFFIDAVIT OF J. SAMUEL GLASSCOCK, ESQUIRE

CITY OF SUFFOLK)
COMMONWEALTH OF VIRIGNIA)

THIS DAY APPEARED BEFORE ME, Jeanette C. Griffin, the undersigned Notary Public, in the jurisdiction aforesaid, J. Samuel Glasscock, Esquire, and stated under oath as follows:

1. My name is J. Samuel Glasscock and I reside in the City of Suffolk, Virginia. I am an attorney licensed to practice law in the Commonwealth of Virginia.

2. In 1982, I was a delegate to the General Assembly of Virginia representing the City of Suffolk, Virginia.

3. On August 10, 1982, I was a witness to the execution of Frank J. Coppola.

4. The Commonwealth of Virginia executed Coppola by applying two separate series of electrical current through his body, each lasting approximately 55 seconds.

5. During the second application of current, smoke began to flow from Mr. Coppola's head and leg. Soon, flames erupted from Coppola's leg near the site of the leg electrode and a sizzling could be heard that sounded like burning flesh. This flame and sizzling continued until the current was turned off.

EXHIBIT 9

PLAINTIFF EXHIBIT 3

6. I observed smoke and flames [illegible] amounts to fill the entire death chamber with a smoky haze.

7. Although I was in an isolated booth with other witnesses separated from the death chamber by glass and a wall, I could smell an odor that I assume was the smell of burning flesh.

8. Shortly after Mr. Coppola's leg caught on fire, the current was turned off. Within minutes, a medical examiner pronounced Mr. Coppola dead.

9. I do not believe that any representative of the news media was present at the time of the execution.

AND FURTHER THIS AFFIANT SAYETH NOT.

J. Samuel Glasscock, Esquire

Sworn to and subscribed before me this
2nd day of January, 1992.

Jeanette C. Griffin
Notary Public.

My commission expires Aug. 21, 1992.

Richmond Times-Dispatch

METRO

MAR 17 '93 11:01 HNR DIV [illegible]ON

Wilder doesn't plan to stop Poyner execution

BY MICHAEL HARDY AND FRANK GREEN
TIMES-DISPATCH STAFF WRITERS

Gov. L. Douglas Wilder said yesterday that he does not intend to stop the execution of convicted multiple murderer Syvasky J. Poyner, scheduled to die Thursday night in Virginia's electric chair.

"Unless something startling or revealing comes up, I have not seen a reason to intervene," Wilder told reporters at the Capitol yesterday.

Poyner, 36, is to die for the slayings of five Peninsula-area women over 11 days during a series of robberies in 1984, killings that turned the region into a terror zone.

In an interview Wilder characterized Poyner's actions as "barbaric in the form of execution." He shot each woman once in the head, saying that he did not want to leave any witnesses. He chose women as victims, he said, because they were easily frightened.

"There's no indication of innocence" or other mitigating claims, Wilder explained. Poyner confessed to the robberies and killings.

The governor also dismissed claims by some lawyers representing death row inmates that electrocution is unconstitutional because it is cruel and unusual punishment.

"If I felt that, I would not have gone along" with earlier executions, said Wilder, himself a lawyer.

Since he became governor in early 1990 he has refused to grant clemency to 10 men who died in the electric chair. He spared the lives of two condemned men, commuting their sentences to life in prison.

Meanwhile, Poyner's lawyers continued their battle to halt the scheduled execution at Greensville Correctional Center.

"We haven't heard anything officially" from the governor's office, said one of Poyner's lawyers, Alexander H. Slaughter. He declined to comment further. Slaughter was reached at the prison where he was visiting Poyner yesterday.

He said his client was fine.

Last week Poyner asked Wilder for a reprieve from Thursday's execution so that a court could hear evidence on the question of whether execution by the electric chair constituted cruel and unusual punishment.

Slaughter said that he plans to ask the governor for clemency, but that such a request had not been made as of yesterday afternoon.

The 4th U.S. Circuit Court of Appeals has dismissed Poyner's electric chair challenge and denied his request for a stay. Shannon Sinclair, another Poyner lawyer, said that the matter has been appealed to the U.S. Supreme Court.

The Richmond law firms of Hunton & Williams and McGuire Battle & Boothe have joined in an effort to get the use of the electric chair declared unconstitutional.

Apparently no court in the country has heard evidence about the effects of the electric chair on the human body for at least 100 years — since before the electric chair was used for the first time.

P.20

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